87-1724

Supreme Court, U.S.
FILED
FEB 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

*

NO. _____

*

JUDY CATES, Individually and Independent Executrix of the Estate of James Cates, deceased,

Petitioner,

versus

INTERNATIONAL TELEPHONE AND TELEGRAPH CO; ITT REINSURANCE CO. OF LONDON; ITT LIFE INSURANCE; HARTFORD LIFE INSURANCE CO.; HARTFORD INSURANCE GROUP; and ALBERT J. STRATTON, On Behalf Of Himself And Certain Other Underwriters Of LLOYDS,

Respondents.

*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

*

Benton Musslewhite
609 Fannin, Suite 517
Houston, Texas 77002
(713) 222-2288
Attorney for Petitioner

QUESTIONS PRESENTED FOR REVIEW

I.

Whether the Petitioners have alleged in their Third, Fourth or Fifth Amended Complaints, a cause of action against the Respondents based on breach of contract, anti-trust conduct, or market place torts, or any one of such theories, sufficiently to withstand a dismissal for failure to state a claim under the guildelines established by this Court in *Conley v. Gibson*, 355 U.S. 41 (1947) and its progeny?

II.

Whether the district court was justified in imposing upon Petitioners the nine pleading requirements listed in its Order of February 7, 1986 and, to the extent the district court was so justified, whether the Petitioners complied with such requirements sufficiently to withstand the drastic remedy of dismissal for failure to comply with such Order?

III.

Whether most, if not all, of the pleading requirements contained in the February 7, 1985 Order - since they generally related to the question of whether the Petitioner Cates, a minority partner, had the standing to sue for his proportionate share of the potential partnership recovery against Respondents, despite the opposition to the suit of the majority partners, and since, further, a final judgment had been entered by the state court resolving that issue by partitioning to Petitioners their proportionate share of such recovery, with express right to proceed with this suit to effectuate such recovery - were made moot by the Final Judgment of Partition entered by the state court.

LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE DISTRICT COURT AND THE COURT OF APPEALS

Petitioner in this Court and Plaintiffs in the action in the District Court are listed below along with Resondents in this Court and Defendants in action in the District Court:

Judy Cates, Individually and Independent Executrix of the Estate of James Cates, Deceased, Petitioner.

Benton Musslewhite,
Attorney for Petitioner.

International Telephone & Telegraph Co.; ITT Reinsurance Co. of London; ITT Life Insurance Company; Hartford Life Insurance Company; Hartford Insurance Group; Albert J. Stratton, on behalf of himself and certain other Underwriters of Lloyds, Respondents.

William Key Wilde
Bracewell & Patterson
3500 Republic Bank Center
Houston, Texas 77002
Attorney for Respondents

J. Eugene Clements
Porter & Clements
3500 Republic Bank Center
Houston, Texas 77002
Attorney for Respondents

SUBJECT INDEX

Questions Presented for Reivew..... i

List of All Parties To the Proceedings in the District Court and Court of Appeals..... iii

Reference to Official and Unofficial Reports of Opinion Delivered by Courts Below..... 1

Grounds Upon Which the Jurisdiction of This Court Is Invoked..... 1

Constitutional Provisions, Statutes and Rules Which This Case Involves..... 2

Statement of the Case..... 2

Reasons For Granting Certiorari..... 19

A. Preliminary Statement..... 19

B. Grant of Certiorari Is Appropriate Because of the Direct Conflict Between the Second Decision of the Court of Appeals, Made the Basis of this Petition, On the ONe Hand, and *Conley v. Gibson* and the First Decision of the Court of Appeals, On the Other Hand..... 21

C. The Question Concerning the Pleadings Is Extremely Important Because It Goes To The Threshhold Fundamental Due Process Right To Have Cases Heard On The Merits Rather Than Being Dismissed On Hypertechnical Grounds..... 28

D. Petitioners Fully Complied With Pleading Order of February 7, 1986; Therefore No Part of the Plaintiffs Fourth or Fifth Amended Complaints Should Have Been Stricken..... 29

E. In Sum, It Is Important For This Court To Grant Certiorari And Make It Clear That *Conley v. Gibson* Is Still The Law; That The Right Of Parties To Petition The Courts for a Redress of Grievances and To Trial By Jury, Imbedded In the First And Seventh Amendments, Is Still Sacred; And That This Court Simply Will Not Tolerate The Hypertechnical Use By Federal Courts Of The Drastic Remedy of Dismissal Of Complaints For Failure to State a Claim..... 35

Prayer..... 36

Certificate of Service..... 37

TABLE OF CASES

American Indemnity Co. v. Brown,
307 F.2d 306 (5 Cir.
1961)..... 25

Brunswick Corp. v. Vineberg,
370 F.2d 605 (5 Cir.
1967)..... 33

Cates v. ITT Corp.,
756 F.2d 1161 (5 Cir.
1985)..... 11, 17, 20
passim

Conley v. Gibson,
355 U.S. 41
(1947).....20, 22, 26
passim

Dussory v. Gulf Coast Inv. Corp.,
660 F.2d 594 (5 Cir.
1981)..... 13, 26, 29
passim

Foman v. Davis,
371 U.S1 182
(1950)..... 28, 29

Glus v. Brooklyn Eastern Dist.
Terminal, 359 U.S. 231 35

Grossling v. Ford Memorial Hosp.,
614 F.Supp. 105
(D.C.Tex)..... 35

Hammond Packing Co. v. Arkansas,
212 U.S. 322 (1909)..... 36

Kirby v. Cruce,
688 S.W.2d 161 (Tex.App.
1985)..... 35

Klebanow v. New York Produce
Exchange,
344 F.2d 294 (2 Cir.
1965)..... 32

Mack v. Newton,
737 F.2d 134 (5 Cir.
1984)..... 35

Massey-Ferguson, Inc. v. Bent
Equip. Co.,
283 F.2d 12 (5 Cir.
1960)..... 35

McLain v. Real Estate Inv. Bd.,
444 U.S. 232
(1980)..... 28

O'Quinn v. Chambers County, Texas,
636 F.Supp. 378 (S.D.Tex.
1986)..... 35

Poller v. CBS,
368 U.S. 464
(1962)..... 32

Quality Foods v. Latis
Agribusiness Dev.
711 F.2d 989 (11 Cir.
1983)..... 33

Riveria Congress Assoc.,
18 N.Y.Supp.2d 386 (NY Ct
App 1966)..... 34

Sax v. Sax,
294 F.2d 133 (5 Cir.
1961)..... 34

Storrie v. Fort Worth
Stockyards, 143 S.W. 286
(Tex.App.-Ft Worth 1911)..... 33

Constitution:

Amendment One..... 29, 35

Amendment Seven..... 29, 35

Statutes:

15 U.S.C. Sec.
1..... 7

15 U.S.C. Sec.
2..... 7

15 U.S.C. Sec.
15..... 7

15 U.S.C. Sec.
24..... 7

28 U.S.C. Sec.
1254(1)..... 3

Fed.R.Civ.Proc.:

8(a), (e), (f)..... 3, 21

9(b)..... 3, 32

12(b)(6)..... 3

Other Authorities:

5 Wright, *Pleading Special Damages*..... 25

Wright and Miller, *Federal Practice and Procedure*..... 23

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

*

NO. _____

*

JUDY CATES, Individually and Independent Executrix of the Estate of James Cates, deceased,

Petitioner,

versus

INTERNATIONAL TELEPHONE AND TELEGRAPH CO; ITT REINSURANCE CO. OF LONDON; ITT LIFE INSURANCE; HARTFORD LIFE INSURANCE CO.; HARTFORD INSURANCE GROUP; and ALBERT J. STRATTON, On Behalf Of Himself And Certain Other Underwriters Of LLOYDS,

Respondents.

*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

COMES NOW Petitioners and move the Court to grant a writ of certiorari in this cause and for such petition would respectfully show:

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED BY THE COURTS BELOW

1. The district court's docket entry order of April 11, 1986, granting Respondents' motion to dismiss with prejudice is attached as Appendix A.

2. The district court's order of August 19, 1986, overruling Petitioner's motion for new trial is attached as Appendix B.

3. The unpublished order of the Court of Appeals, affirming the district court's dismissal, dated August 20, 1987, is attached as Appendix C.

4. The order of the Court of Appeals overruling Petitioner's motion for rehearing and motion for rehearing en banc, dated December 1, 1987, is attached as Appendix D.

GROUNDS UPON WHICH JURISDICTION OF SUPREME COURT IS INVOKED

The order of the Court of Appeals overruling a timely filed petition for rehearing was entered on December 1, 1987.

This Petition for Certiorari was properly transmitted 90 days from the date of such order (90th day falling upon a Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES WHICH THIS CASE INVOLVES

This case involves the construction and application of Rule 12(b)(6), 9(b), 8(a), (e), (f) and 41(b) of the Federal Rules of Civil Procedure and the First and Seventh Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner James Cates filed suit in 1979 against ITT Life Insurance Company and other ITT companies (hereinafter "ITT Life") and Lloyds of London (hereinafter "Lloyds"), alleging essentially three causes of action on behalf of two Texas general partnerships, San Jac International ("SJI") and San Jac Associates ("SJA"), namely: (1) that ITT

Life and Lloyds breached contracts with SJI and SJA; (2) that ITT Life and Lloyds conspired to restrain trade with respect to SJI and SJA, in violation of the anti-trust laws; and (3) that ITT Life and Lloyds committed market place torts against SJA and SJI, for example tortious interference with contracts, fraud, and the like. Cates also sued ITT Life and Lloyds individually, for anti-trust violations and market-place torts aimed at him individually.

The lawsuit revolves around a "multiple employers trust" that was conceived and designed by James Cates. As alleged, "these trusts were designed to market the insurance products (such as medical, hospitalization, health, accident, disability and life insurance), to handle claims, and, through the advantageous combination of employer groups, generate substantial savings to the policyholders and members of the various trusts...." (p.

4, App. G). This trust was to be administered (including marketing of the insurance products, processing of claims and all administrative functions) by the two "San Jac" entities, SJA and SJI[1] ITT Life, pursuant to contractual agreements between SJA and SJI and ITT Life, agreed to be the insurance underwriter for the trust. In turn, ITT Life and SJA and SJI entered into agreements with Lloyds for reinsurance.

The breach of contract allegations centered upon three assertions:

(1) that the agreements between ITT Life and SJA, SJC and SJI required ITT Life to market San Jac products in eleven states; however, the depositions of officers of ITT Life established that ITT Life brazenly ignored its obligations in that regard and ***did not even try*** to market

1. San Jac Corporation ("SJC") was also initially sued, but it played such a minor role in the scheme of things that plaintiffs subsequently dropped SJC as a party.

the San Jac products in those eleven states. See pp. 6-8, 24-26 of App. G.

(2) that the agreements and custom and practice obligated ITT Life, as the insurance underwriter, to pay all claims processed and approved by SJA and SJI in a timely manner: however, ITT Life repeatedly and unreasonably delayed the payment of claims, in breach of its obligations in that regard. See pp. 9-10, 24-26 of App. G.

(3) that ITT Life had the contractual obligation to perform all the responsibilities of insurance underwriter but, instead, forced upon the San Jac entities "conduct inconsistent with the Insurance Code of the State of Texas by requiring that they undertake local insurance company functions"; ITT Life thereby breached the contractual agreements whereby it was to perform the underwriter functions. See pp. 10, 11, 24-26 of App. G.

(4) that the foregoing breaches resulted in tremendous damages to the San Jac entities because each of them, or a combination thereof, caused a drastic reduction in gross income to the San Jac entities, a hemorraghing of members and member groups and unanticipated costs and expenses; the consequences of these adverse effects was to economically destroy and drive the San Jac entities out of business. See 33-35, App. G.

The anti-trust allegations essentially centered upon the contentions that the conduct of the Respondents, ITT Life and Lloyds, violated the Clayton Act, 15 U.S.C. 15 and 24 and the Sherman Act, 15 U.S.C. 1 and 2, in that such Respondents conspired to squeeze-out, economically destroy and take over the San Jac entities and then to generate a boycott of Cates in the insurance industry, all in restraint of trade. See pp. 16-24, App. G.

The market-place torts allegations involved averments that the defendants, individually and in concert, tortiously interferred with contracts between the San Jac entities and their agents and brokers; tortiously interferred with the use and enjoyment of the San Jac entities' property rights, namely the employers trust concepts and lists of brokers, agents, and marketing sources; committed tortious civil obstruction of justice by acting in collusion with the majority partners to wrongfully interfere with San Jac's lawsuit against the defendants; and were guilty of tortious "outrageous conduct", tortious fraud and tortious breach of fiduciary obligations. See pp. 26-33, App. G.

Petitioners also alleged that the Respondents, after the partnerships became defunct, launched upon a course of tortious conduct toward Cates individually (tortious interference with his contracts and legal rights, boycott and other outrageous conduct).See pp. 61-68, App. G.

Petitioners took a number of depositions of ITT Life officers and employees, some of whom admitted to a breach of the contracts with SJA and SJI. See depositions on file in district court. Soon thereafter, ITT Life activated its conspiracy with Cates' majority partners, G. C. Petty ("Petty"), Robert Boyer ("Boyer") and Michael Collins ("Collins") and had them intervene to stop all proceedings on behalf of SJA and SJI. Petitioners filed a Second Amended Complaint alleging a partnership derivative suit; that Petty, Boyer and Collins were actig in collusion and conspiracy with ITT Life and Lloyds in order to forestall the suit on behalf of SJA and SJI; and that Petty, Boyer and Collins, acting contrary to the best interests of SJA and SJI, conspired with ITT Life and Lloyds for their own personal benefit. Petitioner asked for the appointment of a receiver for SJA and SJI, a winding up of their affairs, a partition of the assets, including the lawsuit

against ITT Life and Lloyds, and that Petitioner be allowed to proceed against ITT Life and Lloyds for his proportionate share of the partnership lawsuits.[2]

Despite these allegations, ITT Life and Lloyds persuaded the district court, Bue, J., to dismiss the complaints on the grounds that Petitioner had stated no cause of action, either individually or on behalf of the partnerships, or for his proportionate share of the partnerships' suit against ITT Life and Lloyds. The Fifth Circuit Court of Appeals reversed and, in a thorough opinion by Judge Garwood, held that Petitioner, as a minority partner, indeed did have the right to pursue the partnership claims on behalf of his proportionate share as long as he alleged "improper ulterior motives"

---

2. Cates owned one third of SJI and one half of SJA. Cates died while the first appeal was pending. His wife, Judy Cates, was substituted by suggestion of death for the estate of James Cates as well as for herself as surviving wife. We will continue to refer to the Cates' representative plaintiffs as "Cates" or "Petitioners".

or bad faith on the part of the majority partners with respect to the lawsuit on behalf of the partnerships and that if a minority partner makes such allegations he can pursue such lawsuit for his "percentage of such claims." **Cates v. ITT Corp.**, 756 F.2d 1161 (5 Cir. 1985), see discussion particularly at 1178-80.[3]

Soon after issuance of the mandate, Petitioner filed a motion for leave to file Plaintiffs' Third Amended Complaint and Judge Bue denied that motion and issued an Order dated February 7, 1987, listing nine modifications he wanted Petitioner to make in his pleadings in

---

3. The Court of Appeals mentioned a number of ways in which this could be accomplished, including but not limited to, minority partner's derivative suit, appointment of a receiver, partition or directly by allegations setting up improper ulterior motives or bad faith. The Court of Appeals did not make it clear whether the "receiver" could be appointed by the federal court as well as the state court. Cates had already instituted, in state court, an action against Petty, Boyer and Collins asking that a receiver be appointed for SJA and SJI and that the assets, including the lawsuit against ITT Life and Lloyds, be partitioned.

order to be permitted to amend. This Order did *not* indicate that Judge Bue did not understand the pleadings, or that they were confusing or voluminous, or that they were *not* "short and plain." This Order required the plaintiffs to plead in *more detail*, not less, and with *more particularity* the allegations as to fraud, conspiracy, bad faith, special damages and jurisdiction.[4] The February 7, 1986 order is attached as Appendix E to this Petition. Petitioners then filed their motions for leave to file the Fourth and Fifth Amended Complaints and we have attached a chart, as Appendix F, which lists the paragraphs in both the Fourth and Fifth Amended Complaints demonstrating that Petitioners completely satisfied *all* of the pleading requirements imposed by

4. The Order also required the Petitioners to delete all new causes of action and parties, all allegations that Cates had actual authority to initiate the suit and all references to Cates as a contracting party and, finally, required that Cates' individual claims be alleged separately from his allegations on behalf of the partnerships. See Appendix E.

Judge Bue in the February 7, 1986 order. We have also attached the Fifth Amended Complaint as Appendix G.

Meanwhile, the state district court entered an agreed Final Judgment partitioning the assets of SJA and SJI, including the lawsuit and claims against ITT Life and Lloyds, with Cates being expressly given the right to proceed against ITT Life and Lloyds for his proportionate share of the partnerships' claims against them.[5] The effect of this

---

5. The concept of winding-up and partitioning the assets, including the partnership claims, was suggested by the Court of Appeals in the first appeal. 756 F.2d at 1180. Indeed, since the Final Judgment of partition was "agreed to" between Cates and the majority partners, it cannot be denied that the majority partners thereby "consented" to the suit against ITT Life and Lloyds, thus surely making all pleadings and arguments about Cates' right to sue for his proportionate share of SJA's and SJI's claims against ITT Life and Lloyds moot. The Respondents tried to obviate the Final Judgment of partition on the ground that it was entered after the dismissal. However, since it was entered, and brought to the attention of the district court, long before the court passed upon the Petitioners' motion for new trial, the district court had the duty to consider it and give it full force and effect. *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 598 (5 Cir. 1981).

partition judgment was to make the allegations, and the complaints about such allegations by Judge Bue (in his February 7, 1986, order) concerning ulterior motives, conspiracy, bad faith and other allegations relating to Cates' standing-to-sue for his proportionate share of the partnership claims, ***entirely moot***. See Final Judgment of Partition, attached as Appendix H.

Moreover, aside from the mootness of the standing-to-sue allegations, Petitioners will demonstrate, see argument *infra*, that the pleadings of conspiracy, bad faith and ulterior motives, contained in the Fourth and Fifth Complaints, were more than sufficient to satisfy the federal rules. In that regard, Petitioners alleged that the majority partners, toward the end of the active history of the partnership entities, started conspiring and colluding with the Respondents; they began giving them Cates' trade secrets, including his methodology, list of customers, etc.; such

actions were damaging to the partnership entities; when Cates decided that it would be in the best interests of the partnerhip entities to sue the Respondents, the majority partners conspired with the Respondents to obstruct civil justice and to forestall the suit by opposing it, not for legitimate business reasons but for the ulterior, selfish motives hereinafter described; indeed, the majority partners had admitted publicly that the lawsuit should be filed, that it was a viable lawsuit and that it was the last hope for the survival of the partnerships; the majority partners - though publicly admitting that the partnerships were insolvent and worth nothing except for the lawsuit itself and that they did not intend to spend any more time or money on the partnership business, leaving Cates to do the winding-up - refused, for no valid business reasons,Cates' offers to buy them out and/or indemnify them if they would let him pursue the lawsuit (all at his own

expense); they also unreasonbly opposed the state court suit to have a receiver appointed who would be authorized to pursue the federal court lawsuit, complete the winding-up and partition the assets of the then defunct partnership entities; most indicative of the conspiracy was the secret settlement the majority partners entered into with the Respondent ITT life, the purpose of which was to utterly destroy Cates' standing to continue the litigation against ITT Life; the majority partners also thereafter secretly moved the records of the partnership entities (which Cates needed for use in the federal lawsuit) to Odessa, Texas, beyond Cates' control and beyond the jurisdiction of the court; and the "ulterior motives" of the majority partners in conspiring with the Respondents to obstruct the partnership lawsuit were to receive from the Respondents "personal" dispensation in connection with claims against the

majority partners, beneficial compensation and help in starting up their new businesses in the insurance industry. See Count Four, pp. 36-60 of App.G. These allegations, stated in great detail as required by Judge Bue, tracked the suggestions of the Fifth Circuit in its first decision, 756 F.2d at pp. 1175-1181. The Petitioners requested the appointment of a receiver; a partition of the assets, including the lawsuit; a winding-up of the affairs of the partnerships; asserted a minority partner derivative suit; and sought equitable recovery of Cates' proportionate share of the partnership damages, all as suggested by the Fifth Circuit. 756 F.2d at 1175-1180 and Count Four, App. G, pp. 36-60.

The district court - despite the Final Judgment of Partition; despite the fact that Petitioner had complied with the February 7, 1986 Pleading Order in all respects; and despite the fact that the

Second, Third, Fourth and Fifth Amended Complaints stated viable causes of action against ITT Life and Lloyds - denied Petitioners motion for leave to amend and dismissed Petitioners' case on the asserted ground that the Fourth and Fifth Amended Complaints were "regurgitations" of the Third Amended Complaint and, impliedly, that none of them stated a cause of action. The district court's docket entry of April 11, 1986, granting Respondents' motion to dismiss with prejudice, and the district court's order overruling Plaintiffs Motion for New Trial are attached as Appendices A and B.[6]

The Petitioners timely appealed to the Court of Appeals and - after eight years of litigation in which

---

6. It should be noted that, although the Respondents spent a great majority of their time and effort seeking to have the district court impose sanctions, including the sanction of dismissal, upon Petitioners, as we stand before this Court the question of sanctions for any reason is irrelevant because the district court expressly declined to impose any sanctions and based the dismissal *solely* on the ground of pleading deficiencies.

hundreds of hours of legal time and thousands of dollars in litigation costs had been expended; after substantial discovery on the merits had been completed; after that discovery established that Petitioners would almost certainly make recovery against ITT Life, at least for breach of contract; after the thorny standing-to-sue question had been resolved, despite the district court's erroneous handling of the issue, by the Court of Appeals in the first appeal and also by the state court's Final Judgment of Partition of the partnership assets; without the Respondents having filed a motion for summary judgment so that Petitioners would at least have the protections of Rule 56, FRCP.; and after Petitioners had filed five complaints, two of which clearly complied with the district court's order to plead in more, not less, detail - the Court of Appeals

summarily, without fanfare, without an opinion, and totally without justification, stripped Mrs. Cates and the estate of James Cates of their right to a trial before a jury, in violation of the First and Seventh Amendments and directly contrary to this Court's decision *Conley v. Gibson*, 355 U.S. 41 (1957) and even contrary to its own prior decision, 756 F.2d 1161. See the unpublished Court of Appeals' decision in this appeal, Appendix C, and the denial of petition for rehearing and rehearing en banc, Appendix D.

REASONS FOR GRANTING CERTIORARI

A. Preliminary Statement. This is a case deserving certiorari intervention by this Court because it is a gross - and we respectfully repeat, *gross* - travesty upon justice. The fundamental question here is whether this Court wants to allow legal rights to be unjustly emasculated through hypertechnicality. Any reasonable person can discern from the Fourth and

Fifth Amended Complaints what the essential bases of Petitioners' allegations against the Respondents are. The Petitioners have in every way complied with Rule 8 of the F.R.C.P. The tragedy is that the district court would never force the Respondents to complete discovery on the merits (which had been well underway) and then proceed to trial on the merits. If the district court had, this case would have probably been settled or certainly disposed of with a lot less judicial time and parties' expense. And most important, the ends of justice would have been served, as Rule 8 requires. Finally, what is so judicially tragic in this case is that Respondents did not secure a summary dismissal after Petitioners had been afforded the protections of Rule 56. Instead - after seven years of hard-fought litigation; in a case involving millions of dollars in real losses; wherein hundreds of pages of

depositions had been taken; the Court of Appeals had previously taken the pains to write a long and important opinion reversing the district court in another instance where Respondents had led the district court into an erroneous dismissal - Respondents secured a disposition by the Court of Appeals via a one paragraph statement, sweeping away Mrs. Cates' rights forever.

B. Grant of Certiorari Is Appropriate Because of the Direct Conflict Between the Second Decision of the Court of Appeals, Made the Basis of this Petition, On the One Hand, and *Conley v. Gibson* and the First Decision of the Court of Appeals, On the Other Hand.

In this appeal, the Court of Appeals, in the decision made the basis of this Petition, in effect held that neither the Second, Third, Fourth nor the Fifth Amended Complaints stated a cause of action against ITT Life and Lloyds. While

the Court of Appeals in the first appeal did suggest that the Second Amended Complaint could have been drawn better, it did consider it adequate enough to require a reversal. The Court stated:

> We are, of course, governed by the rule that pleadings are to be construed with great liberality when there has been a dismissal on the merits for failure to state a claim. Such a dismissal is not proper "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). And, in this connection, a deficiency in "recitation of formulas" will not normally justify the dismissal. *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 601 (5 Cir. 1981).

756 F.2d at 1179-1180.

Professor Wright, in Wright and Miller, *Federal Practice and Procedure*, Chap. 4, Sec. 1202, pp. 59-61, has elucidated further the law concerning pleadings:

> Rule 8 is the keystone of the system of pleading embodied in the federal rules. These provisions state that technical forms of pleadings are not required, that pleadings are to be construed liberally so as to do substantial justice . ... as a practical matter these provisions have ramifications that transcend the pleading stage of federal practice. To some degree, the functioning of all the procedures in the federal rules for broad joinder of

> parties and claims, discovery, free amendment, and summary judgment are inextricably intertwined with the pleading philosophy embodied in Rule 8. ... *The relevant facts may be determined by discovery.* The issues likewise may be narrowed by discovery, or by a pre-trial conference, or by "partial summary judgment" under Rule 56(d). ... *The only function left to be performed by the pleadings alone is that of notice. Thus, pleadings under the rules may simply be a general summary of the party's position that is sufficient to advise the other party of the event being sued upon ... No more is demanded of the pleadings than this."*

(Emphasis ours). As Professor Wright further noted, "under the Federal Rules it is very difficult for counsel to draft a pleading so badly as to lose the rights of his clients ... indeed, it has been said that 'a sixteen-year old boy could plead' under these rules." *Id.* at 65.

It defies reason for anyone to say that he or she cannot easily perceive, from a reading of the Third, Fourth or the Fifth Complaints, that ITT Life and Lloyds are being sued for breach of contracts with SJA and SJI, for anti-trust and market place tortious conduct towards SJA and SJI

and for tortious misconduct toward Cates individually. Neither the Court of Appeals, nor the district court below, nor even the Respondents, *ever* complained about the breach of contract allegations or the allegations of general damages. The essence of the criticism of the Court of Appeals in the first appeal concerned the allegations of fraud, 756 F.2d at 1180, and the court below extended that criticism to the "bad faith" and "conspiracy" allegations, *solely* as they pertained to the standing-to-sue question. See App. E.[7] But, in the first place, the

---

7. The allegations as to jurisdiction track the Pleadings' Form Appendices to the federal rules and the allegations as to special damages are more than adequate. See 5 Wright, *Pleading Special Damages*, Sec. 1310, p. 442, et seq. and *Great American Indemnity Co. v. Brown*, 307 F.2d 306 (5 Cir. 1962). The other requirements in the February 7 Order - such as dropping the new parties and claims, not referring to Cates as a contracting party and separating the invidiaul claims from the partnership claims - were obviously complied with. See App. F.

Final Judgment of Partition made those pleadings, and the entire issue of whether Cates could recover his proportionate share of the partnership claims, moot. See discussion by the Court of Appeals in the first appeal to the effect that a minority partner can recover his "aliquot" share or "appropriate fraction" of partnership claims. 756 F.2d at 1179.

In the second place, *there is absolutely no reason why - since not even the district court criticized such allegations - the Court of Appeals in this appeal did not at least reverse the total dismissal and hold that plaintiffs had stated a cause of action for their proportionate share of the claims of SJA and SJI for breach of contract, anti-trust violations and market-lace torts (other than fraud) against ITT Life and Lloyds. Cates v. ITT* (first appeal), this Court in *Conley v. Gibson* and *Dussouy* absolutely require at least that much. And the most

shocking of all is that the Court of Appeals in this appeal - in complete defiance of the Court of Appeals' decison in the first appeal - even affirmed the striking down of Cates' individual causes of action against ITT Life and Lloyds. This is particularly distressing since Cates clearly separated the individual causes of action from the partnerhip causes of action which is the *only* thing the district court below required the Petitioners to do in order to satisfy the Pleading Order of February 7, 1986, with respect to the individual causes of action.

Most important, the actions of the Court of Appeals in this appeal directly conflict with the venerable precepts long established by this Court in such cases as *Conley v. Gibson*, 335 U.S. at 45-46 [a dismissal of pleadings is not proper "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle

him to relief"]; *Foman v. Davis*, 371 U.S. , 182 (19)[reaffirming the policy of federal rules to permit liberal amendment to facilitate determination of claims on the merits and to prevent litigation from becoming a technical exercise in the fine points of pleading]; and *McLain v. Real Estate Investment Board*, 444 U.S. 232 (1980).

As we have stated above, a reading of the Third, Fourth or Fifth Complaints demonstrates beyond doubt that Petitioners plainly stated a cause of action *on at least one of the counts asserted*, thus precluding a dismissal with prejudice *of the entire suit*. And, indeed, at the very least, it *cannot* be said that "beyond doubt plaintiffs could prove no set of facts in support" of one or more of their claims. Therefore, because the Second Court of Appeals' affirmation of the district court's improvident dismissal clearly conflicts with *Conley v. Gibson*

and the other Supreme Court authorities cited above, and even Fifth Circuit law, see the first Fifth Circuit appeal, 756 F.2d 1161 and *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594 (5 Cir. 1981), the Court should grant certiorari in order to resolve the conflict and therefore maintain a uniformity in the law.

C. The Question Concerning the Pleadings Is Extremely Important Because It Goes To The Threshhold Fundamental Due Process Right To Have Cases Heard On The Merits Rather Than Being Dismissed On Hypertechnical Grounds.

As this Court recognized in *Conley v. Gibson* and *Foman v. Davis*, questions such as those presented here are important because they deal with the fundamental purposes of the federal rules and our Constitution (see the First and Seventh Amendments) and that is to give every citizen the right to his or her day in court without having it unjustly stripped away on hypertechnical grounds. To hold,

as the Second Court of Appeals did in this case, that Petitioners did not allege a cause of action in the Third, Fourth or Fifth Amended Complaints is to violate those important precepts.

D. Petitioners Fully Complied With Pleading Order of February 7, 1986; Therefore No Part of the Plaintiffs Fourth or Fifth Amended Complaints Should Have Been Stricken.

The chart we have attached as Appendix F conclusively establishes that Petitioners totally complied with the Pleading Order of February 7, 1986. As we noted above, Judge Bue did not ever say *he* did not understand the plaintiffs' complaints. Nor did *he* criticize such pleadings for being too long or too verbose. Indeed, he criticized the Third Amended Complaint *primarily because it was not detailed enough*. See App. E. Therefore, Petitioners - standing before a judge whose dismissal of their case had already been reversed once, and who was making noises

as if he were setting the stage for still another dismissal, See App. E - can hardly be blamed for pleading again, and again, and again, the details of the fraud, the conspiracy, the bad faith and the collusion theories. As was counsel's duty, we were doing everything in our power to satisfy the district court's seemingly insatiable desire for particularization and detail. We do not believe it was fair to Petitioners for the Second Court of Appeals, as it may have done, to penalize Petitioners and deprive them of their constitutional right to trial by jury, because Petitioners were guilty of doing precisely what the district court ordered them to do - plead in great detail.[8]

---

8. We mention this because, at oral arguments in the Court of Appeals, members of the Panel made comments about verboseness and repetition and, because the Court of Appeals did not deign to express any reasons for its decision, Petitioners have no way of knowing whether this was actually one of the reasons for its decision or not.

And, in any event, the allegations contained in the Fourth or Fifth Amended Complaints were more than adequate to sustain the charges of "conspiracy" and "bad faith" on the part of the majority partners.[9] The first Court of Appeals in *Cates v. ITT* pointed to similar allegations as being sufficient, see e.g., 756 F.2d at 1165, 1166. In *Storrie v*

---

9. We should point out Rule 9(e) is directed toward allegations of "fraud" between parties, the details of which the complaining party should have about as much knowledge as the party complained of. But that is *not* the type of turpitude - insofar as the conduct of the majority partners and the defendants relating to Cates' efforts to sue the defendants was concerned - that the Court of Appeals in the first appeal, *ITT Life v. Cates*, deemed necessary to provide Cates with the standing-to-sue on behalf of the partnerships. The Court was speaking of a "conspiracy" similar to that referred to in *Poller v. CBS*, 368 U.S. 464 (1962), between defendants and third-parties, wherein the Court stated that it is a rare case when a plaintiff is not entitled to a jury trial, "the hallmark" of our system of justice, on the issue of "conspiracy", in which cases most of the evidence "is in the heads of the conspirators and hostile witnesses thicken the plot." 368 U.S. at 491.

Fort Worth Stockyards, 143 S.W. 286 (Tex.App.-Ft Worth 1911, no writ), the allegations were much more sparse, the plaintiffs alleging simply that the majority partners had settled a valid partnership claim for less than its value. 143 S.W. at 287. In *Dussouy* it was simply alleged that the defendant Gulf Coast and their lawyers conspired together to restrain trade. 660 F.2d at 597, 598. In *Quality Foods v. Latin Agribusiness Dev.*, 711 F.2d 989 (11 Cir. 1983), a simple conspiracy between the primary defendant and its separate subsidiary to make loans as a means of taking over competition was alleged. 711 F.2d at 993. In *Brunswick Corp. v. Vineberg*, 370 F.2d 605 (5 Cir.1967), the plaintiffs merely alleged a conspiracy by defendants "to strip the Bowl (bowling lanes) of its assets and thus of its ability to perform its contract with Brunswick". *Id.* at 607.

In *Klebanow v. New York Produce Exchange*, 344 F.2d 294 (2 Cir. 1965), the allegations were nothing other than that the majority partners had ties with one of the defendants who were the object of a partnership claim. 344 F.2d at 296. The allegations in *Riveria Congress Assoc.*, 18 N.Y. Supp.2d 386 (Ct.App., N.Y. 1966), were asserted in much less detail but are basically the same as those in this case - that the majority partners conspired with a third party to give them an assignment of a lease which was disadvantageous to the partnership and then refused to sue the third party. 18 N.Y.Supp.2d 389, 390. In *Sax v Sax*, 294 F.2d 133 (5 Cir. 1961), the plaintiff, the wife of a beneficiary of a trust, alleged a conspiracy between the beneficiary and the trustee to deprive the wife of a fair separate maintenance allowance from her husband. 294 F.2d at 134. *In all the foregoing cases the courts held the allegations were sufficient to support a cause of action*

based upon conspiracy.[10]

F. In Sum, It Is Important For This Court To Grant Certiorari And Make It Clear That *Conley v. Gibson* Is Still The Law; That The Right Of Parties To Petition The Courts and To Trial By Jury, Imbedded In The First And Seventh Amendments, Is Still Sacred; And That This Court Simply Will Not Tolerate The Use By Federal Courts Of The Drastic Remedy of Dismissal Of Complaints For Failure To State A Claim Or To Comply With Pleading Orders Unless It Is Clear *Both* That The Pleading Cannot

---

10. Other cases, including Texas cases, are just as liberal concerning conspiracy allegations. *O'Quinn v. Chambers County, Texas*, 636 F.Supp. 388 (S.D.Tex. 1986), on reh. 650 F.Supp. 25 (holding allegations of conspiracy to obstruct justice sufficient); *Grossling v. Ford Memorial Hosp.*, 614 F.Supp. 105 (D.C.Tex.); *Kirby v. Cruce*, 688 S.W.2d 161 (Tex.App. 1985) (holding that civil conspiracy need not be shown by direct evidence and is ordinarily established by circumstantial evidence "since such conspiracies are conceived in secrecy and executed in a manner to avoid detection and exposure"); and *Mack v. Newton*, 737 F.2d 134 (5 Cir. 1984) reh den 750 F.2d 69. Also see *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231 and *Massey-Ferguson, Inc. v. Bent Equip. Co.*, 283 F.2d 12 (5 Cir. 1960).

Possibly Be Read To State Any Cause Of Action And Such Pleading Order Was Clearly And Wilfully Violated.

The foregoing title says it all. If the Second Court of Appeals affirmed the dismissal because it believed the Third, Fourth and Fifth Amended Complaints failed to state any cause of action, it is, as we have stated above, in direct conflict with *Conley v. Gibson*. If the Court of Appeals affirmed the dismissal as a "sanction" for failure to comply with the pleading order of February 7, 1986 (a ground which the district court negated in its Order Overruling Motion for New Trial, App. B), then, since it is quite clear that Petitionrrs made a bona fide effort to comply with such order, the Second Court of Appeals decision is in direct conflict with *Insurance Co. of Ireland v. Compagnie des Bauxites de Guinee*, 450 U.S. 694 (1982); *Societe Internationale v. Rogers*, 357 U.S. 197 (1958); and *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 346, 354

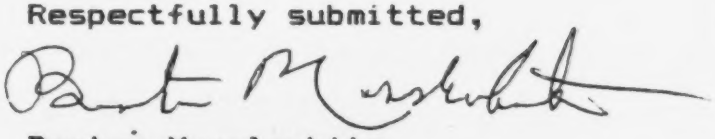
(1969).[11] And these are the only two possible grounds upon which the Court of Appeals could conceivably have affirmed the district court's improper dismissal.

---

11. The district court's comment about "lack of candor" is really unfair. See App. B. The only thing this could be referring to is the fact that Petitionners, in response to Respondents' motions to dismiss had mistakenly stated that the state court had appointed a receiver, when in fact the court had only ordered that "a receiver (be) appointed." See App. I. As explained in an affidavit attached to Petitioners' responding papers, this mistake occurred because the young attorney who handled the hearing before Judge Gupton thought that the appointment of the Receiver would automatically follow. In any event, the issue of a Receiver had absolutely no bearing upon the proceedings in the court below, because, after the Judge Gupton's order was entered, Judge Powell entered the Final Judgment of partition, See App. H, thus making, insofar as Petitioners' standing-to-sue for their proportionate share of the partnership claims were concerned, the apppointment of a Receiver totally moot. Moreover, the district court made it clear that it was not in any way basing its decision to dismiss upon the statements concerning the Receiver. See App. B.

WHEREFORE, premises considered, Petitioners pray the Court to grant certiorari in this case.

Respectfully submitted,



Benton Musslewhite
Attorney for Petitioners
609 Fannin, Suite 517
Houston, Texas 77002
(713) 222-2288
TBA #